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Supreme Court of the United States

OCTOBER TERM, 1959

No. 227

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND THOMAS J. McILWAINE, DIVISION SUPERINTENDENT OF SCHOOLS FOR PRINCE EDWARD COUNTY, VIRGINIA,

Petitioners,

v.

ULYSSES ALLEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: July 20, 1959.

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PETITION FOR A WRIT OF CERTIORARI

I.

INTRODUCTION

The County School Board of Prince Edward County, Virginia, and Thomas J. McIlwaine, Division Superintendent of Schools for Prince Edward County, Virginia, hereby petition that a writ of certiorari issue to review a decree entered by the United States Court of Appeals for the Fourth Circuit on May 5, 1959. That decree reversed an order entered by the United States District Court for the Eastern District of Virginia, Richmond Division, on November 26, 1958, and directed the District Court to do exactly the reverse of what he, in his discretion, had found appropriate in connection with desegregation of the public schools in Prince Edward County, Virginia.

II.

OPINIONS BELOW

The opinion of the District Court (Appendix A) is reported at 164 F. S. 786. The opinion of the Court of Appeals (Appendix C as amended by Appendix E) is reported at 266 F. 2d 507.

The full reported history of this case is as follows:

ACTION	DATE	REPORT
Decree of 3-judge District Court denying relief	March 7, 1952	103 F. S. 337
Probable jurisdiction noted	October 8, 1952	344 U. S. 1
Assigned for reargument	June 8, 1953	345 U. S. 972

ACTION	DATE	REPORT
Reversed in principle and assigned for reargument	May 17, 1954	347 U. S. 483
Continued	November 22, 1954	348 U. S. 886
Decision as to relief	May 31, 1955	349 U. S. 294
Dissolution of 3-judge District Court	July 17, 1956	142 F. S. 616
Decision as to further relief	March 26, 1957	149 F. S. 431
Reversed	November 14, 1957	249 F. 2d 462
Certiorari denied	March 3, 1958	355 U. S. 953
Decision as to further relief	August 4, 1958	164 F. S. 786
Reversed	May 5, 1959	266 F. 2d 507

III.

JURISDICTION

The opinion of the Court of Appeals and its order are dated May 5, 1959. Both the Court of Appeals and this Court thereafter denied a stay of further proceedings. On June 19, 1959, the Court of Appeals denied a Petition for Rehearing that had been filed by the Petitioners within the time prescribed by its rules. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

IV.

QUESTION PRESENTED

There is one question alone presented by this case:

Is a Court of Appeals permitted to substitute its discretion for that of a District Court as to the permissible means to be followed toward compliance with a school desegregation decree where this Court has said

that the broad discretion is vested in the District Courts and not in the Courts of Appeals?

This question should, we submit, be answered in the negative and the order of the Court of Appeals in this case should be reversed.

V.

STATEMENT OF THE CASE

This is one of the five original school segregation cases ultimately decided by this Court in 1955. It is, we believe, the only one of the five that remains in active litigation, although in Clarendon County, South Carolina, the locale of *Briggs* v. *Elliott*, another of the five cases, no steps toward desegregation have been taken.

An order was entered on remand from this Court requiring desegregation "with all deliberate speed." The Respondents thereafter sought further relief, and the District Court denied this application in a thoughtful opinion giving consideration to all relevant factors. 149 F. S. 431. His conclusion was summarily reversed by the Court of Appeals, 249 F. 2d 462, and certiorari was denied by this Court, 355 U. S. 953.

So the case went back to the District Court and the Respondents filed a further motion. Before the matter came on for hearing, the Petitioners acted. A means to save public education in rural southside Virginia is not easy to find and the action of the Court of Appeals made finding it more difficult. The School Board had exhausted all of its means to find a solution to the problem without outside help. So on July 2, 1958, by formal resolution, the School Board directed

the Superintendent of Schools to recommend to it an expert who would be employed:

> ". . . to consider the problems existing in the school system of Prince Edward County and to submit by report to the board his findings and recommendations. . . ."

The report would then be submitted to the District Court.

The case thereafter came on for further hearing before the District Court. Testimony was taken as to the action taken by the School Board and as to conditions existing in the County. No evidence was offered by the Respondents here.

On August 4, 1958, the District Court handed down a well considered and scholarly opinion. We invite the Court's careful attention to this opinion (reprinted in Appendix A). The Court pointed out that this Court had specifically given him wide latitude for the exercise of discretion. He noted that the Court of Appeals had directed him to require the Petitioners here to make a start toward compliance and had further required him to fix a time limit for ultimate compliance. So far as the former was concerned, the Court said:

> "The proposal of the defendants that a comprehensive survey of the entire problem be made by experts trained in the subjects involved is, so far as I am informed, an approach which has not been tried elsewhere. Considering the weight and importance which have been given psychological and sociological factors, such an approach would appear to have merit and to contain the possibility of a worth-while recommendation dealing with the problems peculiar to the particular community with which we are concerned."

As to a time limit for ultimate compliance, the Court

fixed ten years after the 1955 decision of this Court but the power to change this date, either by reducing the period or extending it, was specifically reserved, the power to be exercised in the light of conditions existing at any time.

Despite the fact that the District Court had done on remand exactly what the Court of Appeals had told him to do, the Court of Appeals on further appeal completely disregarded his conclusions and went entirely beyond the case that was before it. First, it mentioned only in a footnote, and in a manner designed to confuse rather than enlighten, the action taken by the School Board to find a solution to the problem. It said simply that:

> ". . . no argument is needed to show that the last delaying order of the District Judge cannot be approved, and that it has become necessary for his Court to give specific directions as to what must be done."

It then proceeded to write in terms an order for the District Court to enter. Its violence is rather amazing; although this case has since its inception in 1951 involved only the high schools of Prince Edward County, and there is no substantial evidence in the record even to support a finding that there are elementary schools in the County or that they are operated on a segregated basis, the Court of Appeals charged boldly into this field. It directed the District Court to enter an order:

> ". . . requiring the School Board to make plans for the admission of pupils in the elementary schools of the County without regard to race. . . ."

This is relief never requested by the Respondents who, as high school students and their parents, are not entitled to

request it; it is a determination by the Court of Appeals unsupported by evidence or argument of any character.

Thus the Court of Appeals eliminated the discretion of the District Court. And this Court may take judicial notice of the calamitous results. Although the expert study was and still is proceeding apace with every hope that it will bear fruit, the precipitate action of the Court of Appeals has devitalized it. The Board of Supervisors of the County, the County's governing body and not a party to this suit, has refused to levy any taxes or appropriate any money for public schools in the County for the year 1959-60. It has refused even to pay the salary of the Superintendent of Schools. Without money, public education comes to a standstill.

So, as the result of the action of the Court of Appeals in this case, there will be no public schools in Prince Edward County this fall. Unless this Court reviews and reverses this case, there will probably be no public schools in the County for many years to come.

VI.

REASONS FOR GRANTING THE WRIT

Our argument as to the necessity for granting the writ in this case is a simple one. It may be briefly stated.

This Court said in its 1955 decision that the District Courts should have broad discretion to accomplish desegregation of the schools. Its words were these:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibilities for elucidating, assessing, and solving these problems; courts will have to consider whether the

action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly we believe it appropriate to remand the cases to those courts." (349 U. S. at p. 299)

It is thus clear that the District Court with knowledge of local conditions that a Court of Appeals could have only by accident and does not have in this case was given unusually broad powers. But what the Court of Appeals has done in this case is to say exactly the reverse. It has required that the District Court conform exactly to its notions of how to accomplish desegregation and has left to the District Court only the ministerial function of entering orders that it prepares.

Did this Court mean that the District Courts should have broad discretion? If it did, the Court of Appeals was in error here and its action should be reversed. If it did not, the word "deliberate" has been removed from the phrase "all deliberate speed." The Southern States are entitled to know whether this Court requires that Negroes be admitted to white schools immediately upon application. If that be true, the rules are changed significantly and materially; there is only one rule to be applied regardless of local conditions.

The action of the District Court was entirely within the instructions previously given by the Court of Appeals. The Court of Appeals had said that a start must be made and an outside time limit for compliance fixed. 249 F. 2d 462. The District Court said that the expert study was an appropriate method of starting. Such a start was made in Clarendon County, South Carolina, and counsel for Respondents

expressed entire satisfaction with that procedure. The District Court fixed 1965 as an outside time limit; the plan of Little Rock, Arkansas, that received, by implication at least, the full approval of this Court, provides for compliance by 1963. See *Cooper* v. *Aaron*, 358 U. S. 1, 8 (1958). If 1963 is proper, is 1965 clearly outside the range of discretion? And the 1965 limit was not fixed for good; it is subject to change at any time upon a showing of a change in conditions.

The action taken by the Court of Appeals here is quite inconsistent with that taken by the Court of Appeals for the Fifth Circuit in *Rippy* v. *Borders*, 250 F. 2d 690 (1957). There the District Court, acting under the assumed compulsion of a prior order of the Court of Appeals, required immediate integration. In reversing, the Fifth Circuit said:

> ". . . the district court must exercise *its own* judgment and discretion in accordance with the applicable principles of law set forth in Brown v. Board of Education of Topeka, supra. It seems to us that the district court did not do this. . . ." 250 F. 2d at p. 693.

There, the District Court did not exercise discretion and was reversed; here it did exercise discretion and was reversed. It seems to us that the borders of the discretion of the District Courts are very far from clear and that the Courts of Appeals are very far from in agreement as to their delineation.

Nothing in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), opposes our position here. In fact, Mr. Justice Frankfurter, concurring, supports the action of the District Court. The District Court believed that some additional time was necessary in Prince Edward County and that it was being constructively used. This is proper, in the view of the Justice, for:

> "Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms." 358 U. S. at p. 25.

Time, constructively used, is permissible. But the Court of Appeals here eliminates time; it requires final action now.

If this Court's determination that discretion in school cases rests in the District Courts and that the action of those courts within broad limits should be supported retains any vitality, the decision of the Court of Appeals in this case is wrong. Since there are thousands of school districts in the Southern States where the principles first announced in this case yet remain for judicial application, it is important that rules established by this Court be given more than lip service. At oral argument in this case, the late Mr. Justice Jackson stated that he foresaw a generation of litigation; his estimate as to length of time will turn out to be conservative unless the applicable rules are clear. This Court should review this case to make those rules clear; it should reverse this case to reestablish for the Federal judiciary the principles that it established in 1955.

VII.

CONCLUSION

The tragic events in Prince Edward County would have been averted if the Court of Appeals had given the District Court the area of discretion that this Court intended it to have. It is important that this Court make clear that it meant what it said.

This case should be reviewed and reversed.

Dated July 20, 1959.

Respectfully submitted,

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